Bandar Nilai Sdn Bhd (formerly known as Jurutera Perunding Rec Sdn Bhd) v Muthusamy a/l Etti Arunchala Goundan & Ors

HIGH COURT (SEREMBAN) — CIVIL SUIT NO 22–75 OF 1994
LOW HOP BING J
25 OCTOBER 2004

Civil Procedure — Functus officio — Setting aside order regularly obtained and perfected — Judgment inter partes — Application to set aside made to another registrar of same High Court that made order — Whether one registrar could set aside final order of another registrar or its own final order — Whether registrar was functus officio

This is an appeal by the fifth and sixth defendants against the decision of the learned registrar who had on 10 November 1999 ('the second order') dismissed both the fifth and sixth defendants, application which sought to set aside another registrar's order made on 5 May 1999 ('the first order'). There was no appeal filed by the fifth and sixth defendants against the first order. The first order was properly entered in the presence of all learned counsel concerned. It was not an order by default nor made in the absence of a party at the trial or hearing.

The main issue for consideration was whether one registrar has the jurisdiction to set aside the order of another registrar in the exercise of co-ordinate jurisdiction.

Held, dismissing the appeal:

(1) The first order had become final and conclusive when there was no appeal against that order and is therefore binding on all the parties hereto (see para 6).

(2) The first registrar who made the order was *functus officio* and neither the first registrar nor any other registrar exercising co-ordinate jurisdiction has the jurisdiction to alter the order or to set it aside. The doctrine of *functus officio* literally means having discharged a duty, and is an expression applied to an agent or donee of an authority who has performed the act authorised, so that the authority is at an end (see para 7).

(3) The power of the registrar is spent and a second decision if made on the same subject matter would be *ultra vires* (see para 14).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh defendan-defendan kelima dan keenam terhadap keputusan pendaftar yang telah diputuskan pada 10 November 1999 ('perintah

kedua tersebut') yang telah menolak permohonan kedua-dua defendan kelima dan keenam yang antara lain memohon untuk mengetepikan perintah pendaftar terdahulu yang telah diputuskan pada 5 Mei 1999 ('perintah pertama tersebut'). Tidak terdapat sebarang rayuan difailkan oleh kedua-dua defendan kelima dan keenam terhadap perintah pertama tersebut. Perintah pertama tersebut telah dimasukkan secara teratur dalam kehadiran kesemua peguam yang terlibat. Perintah pertama tersebut juga bukan merupakan satu perintah secara ingkar mahupun perintah yang diputuskan tanpa kehadiran pihak-pihak pada masa perbicaraan.

Isu utama di hadapan mahkamah ini adalah sama ada seorang pendaftar mempunyai bidang kuasa untuk mengetepikan satu perintah oleh pendaftar lain daripada bidang kuasa yang setara atau ko-ordinat.

Diputuskan, menolak rayuan tersebut:

(1) Perintah pertama telah menjadi perintah yang muktamad dan konklusif apabila tidak terdapat sebarang rayuan terhadap perintah tersebut, oleh yang demikian, perintah itu mengikat kesemua pihak-pihak yang terlibat (lihat perenggan 6).

(2) Pendaftar pertama yang telah memutuskan perintah tersebut telah menjadi *functus officio* dan dengan itu pendaftar pertama mahupun pendaftar-pendaftar lain daripada bidang kuasa yang setara atau ko-ordinat tidak mempunyai bidang kuasa untuk meminda perintah itu ataupun mengetepikannya. Doktrin *functus officio* secara literal bermaksud 'having discharged a duty, and is an expression applied to an agent or donee of an authority who has performed the act authorised, so that the authority is at an end' (lihat perenggan 7).

(3) Kuasa seseorang pendaftar yang telah pun digunakan ke atas sesuatu perkara dan sekiranya keputusan kedua ke atas perkara yang sama dibuat akan menyebabkan keputusan itu *ultra vires* (lihat perenggan 14).]

Notes

For cases on *functus officio* generally, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2421–2437.

Cases referred to

Affin Bank Bhd v WT Low & Ng Realty Sdn Bhd [2003] 1 CLJ 473 (refd)
Arab Malaysian Finance Bhd v Badiaddin bin Mohd Mahidin & Anor [1996] 3 MLJ 621 (refd)
Bank Bumiputra Malaysia Bhd v Hamah bt Awang [2002] 1 LNS 96 (refd)
Bedwell v Wood [1877] 2 QBD 626 (refd)
Datuk Hussain bin Mohamed v First Malaysia Finance Bhd (Bank Negara Malaysia, Intervener) [1990] 1 MLJ 369 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Hongkong Bank Malaysia Bhd v Mohammed Noor Tambo [2002] 3 CLJ 139 (refd)
Jayasinghe v Minister for Immigration and Ethnic Affairs and Another [1997] ALR 332 (refd)
Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic [1990] 92 ALR 93 (refd)
MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (refd)
Re VGM Holdings, Ltd [1941] 3 All ER 417 (refd)

Legislation referred to

National Land Code ss 256(3), 257
Rules of the High Court 1980 O 15 r 8

Anthony Joseph (Muthuvelu Param Rosdin & Co) for the fifth and sixth defendants.
Manian Raju (Gunaretnam & Co) for the interveners/defendants.

Low Hop Bing J:

I APPEAL AND FACTUAL BACKGROUND

[1] Before me is encl (129) which is an appeal by the fifth and sixth defendants in the counterclaim ('D5 and D6') against the decision of the learned registrar ('the registrar') who had on 10 November 1999 dismissed D5 and D6's application in encl (119) which sought to set aside another registrar's order made on 5 May 1999 ('the order').

[2] D5 and D6 did not appeal against the order which has been duly entered, sealed and extracted. It was not an order by default nor made in the absence of a party at the trial or hearing, as the order expressly stated that it was made in the presence of all the learned counsel concerned.

II QUESTION FOR DETERMINATION

[3] The question for determination is whether one registrar has the jurisdiction to set aside the order of another registrar in the exercise of co-ordinate jurisdiction.

III SUBMISSIONS BY COUNSEL AND DECISION OF COURT

[4] Mr Anthony Joseph, learned counsel for D5 and D6, does not appear to have addressed the above question which is the crux of the appeal by D5 and D6 but has instead contended that O 15 r 8 of the Rules of the High Court 1980 requires an amendment to be made within 14 days after the making of the order.

[5] For the interveners/defendants in the original action, Mr Manian Raju submitted that the registrar has correctly dismissed D5 and D6's application in encl (119).

[6] Having considered the above submissions, I am of the view that the order has become final and conclusive when there was no appeal against that order and is therefore binding on all the parties hereto.

[7] Regarding the issue of whether the first registrar who has made the order was *functus officio*, it is necessary to hark back to fundamental principles pertaining to the doctrine of *functus officio*. This doctrine literally means having discharged a duty, and is an expression applied to an agent or donee of an authority who has performed the act authorised, so that the authority is at an end: *Bedwell v Wood* [1877] 2 QBD 626; The Dictionary of English Law by Earl Jowitt, 1959.

[8] A court is *functus officio* when it has already made a final pronouncement on the rights of the parties before it ie once the rights of the parties have been determined as the effect of each proceeding is to bring all proceedings to an end: *Datuk Hussain bin Mohamed v First Malaysia Finance Bhd (Bank Negara Malaysia, Intervener)* [1990] 1 MLJ 369 at p 371.

[9] By way of illustration, in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 PC, the learned judge had made an order for sale in a foreclosure proceeding, after hearing all the parties. There was no appeal against it. The respondent unsuccessfully applied to set aside the judgment, and subsequently applied again to set aside the previous orders. The learned judge thereupon set aside his order. The Federal Court in a judgment delivered by Chang Min Tat FJ (as he then was) held that the learned judge of the High Court could not do so as he was *functus officio*.

[10] This Federal Court decision was followed by the Supreme Court in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 where in the judgment delivered by Harun Hashim SCJ (as he then was) it was held that the order for sale made by the learned judge under s 256(3) and s 257 of the National Land Code 1965 and subsequently perfected was a final order unless appealed against and that the learned judge being *functus officio* had no power to set it aside.

[11] *Hock Hua Bank*, supra, was further followed by the Court of Appeal in *Arab Malaysian Finance Bhd v Badiaddin bin Mohd Mahidin & Anor* [1996] 3 MLJ 621 in which the judgment delivered by Shaik Daud JCA (as he then was) held that it is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order.

[12] See also the judgments of Ramly Ali J in *Hongkong Bank Malaysia Bhd v Mohammed Noor Tambo* [2002] 3 CLJ 139 HC; and Suriyadi bin Halim Omar J in *Bank Bumiputra Malaysia Bhd v Hamah bt Awang* [2002] 1 LNS 96 HC; and Abdul Malik Ishak J in *Affin Bank Bhd v WT Low & Ng Realty Sdn Bhd* [2003] 1 CLJ 473 HC, in which the doctrine of *functus officio* was applied.

[13] Hence, the registrar who has made the order is *functus officio* in the sense that the registrar has performed the function having regard to the statutory power or obligation to perform that function so that there is no further function or act for the registrar as the person authorised under the statute or rule to perform: per Goldberg J of the Federal Court of Australia in *Jayasinghe v Minister for Immigration and Ethnic Affairs and Another* [1997] ALR 332 at 542.

[14] The power of the registrar is spent and a second decision if made on the same subject matter would be *ultra vires*: see eg *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* [1990] 92 ALR 93 at 112.

[15] My view is also fortified by the decision in *Re VGM Holdings, Ltd* [1941] 3 All ER 417, in which Morton J held that where Bennett J has made an order for a stay of execution which has been passed and entered, Bennett J is *functus officio* and neither Bennett J nor any other judge of equal jurisdiction eg Morton J has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

[16] The facts in *Re VGM Holding*, supra, are substantially similar to those in the instant appeal with the judge there being interchanged with the registrar in the appeal before me. That being the case, the first registrar is *functus officio* and neither the first registrar nor any other registrar exercising co-ordinate jurisdiction has the jurisdiction to alter the order or, in the instant case, to set it aside.

[17] In the circumstances, the answer to the above question for determination is in the negative, as one registrar has no jurisdiction to set aside the order of another registrar in the exercise of co-ordinate jurisdiction. I therefore hold that the registrar's decision in dismissing encl (119) is correct, which is hereby affirmed, with the result that this appeal in encl (129) is devoid of merits and is dismissed with costs.

Appeal dismissed.

Reported by Sugandra Rao